

1 Eric J. Sinrod (SBN 122868)  
2 Suzanne R. Fogarty (SBN 154319)  
3 E.J. Kim (SBN 250062)  
**DUANE MORRIS LLP**  
4 One Market, Spear Tower, Suite 2200  
San Francisco, CA 94105-1104  
Telephone: 415.957.3000  
Facsimile: 415.957.3001  
E-Mail: EJSinrod@DuaneMorris.com  
SRFogarty@DuaneMorris.com  
EJKim@DuaneMorris.com

7 Attorneys for Defendants and Counter-Claimants,  
8 BILLING SOLUTIONS INCORPORATED, SEAN  
DUNLEA, TIM PORTLEY, DARIO J. SAAL, and  
SAAL CONSULTING INC.

Joshua A. Ridless (SBN 195413)  
Eugene Y. Kim (SBN 253113)  
**Ridless Law Office**  
244 California Street, Suite 300  
San Francisco, CA 94111  
Telephone: 415.614.2600  
Facsimile: 415.480.1398  
E-Mail: jr@ridlesslaw.com  
ekim@ridlesslaw.com

Attorneys for Plaintiff and Counter-  
Defendants, TELSWITCH, INC.,  
AARON WOOLFSON, JERRY  
MERKT, and MERKT-WOOLFSON

10 UNITED STATES DISTRICT COURT  
11  
NORTHERN DISTRICT OF CALIFORNIA

12 TELSWITCH, INC.,

13 Plaintiff,

14 v.

15 BILLING SOLUTIONS INCORPORATED, an  
16 Illinois corporation, SEAN DUNLEA, an individual,  
17 TIM PORTLEY, an individual, DARIO J. SAAL, an  
individual, SAAL CONSULTING INC., a Florida  
corporation and DOES ONE THROUGH  
18 TWENTY, inclusive,

19 Defendants.

20 Case No. CV 12 0172 EMC

21 **DEFENDANTS' REQUEST TO  
VACATE SETTLEMENT  
CONFERENCE & PLAINTIFF'S  
NON-OPPOSITION ; ORDER (Denied)**

22 The Honorable Edward M. Chen

23 BILLING SOLUTIONS INCORPORATED, an  
Illinois corporation, SEAN DUNLEA, an individual,  
and TIM PORTLEY, an individual,

24 Counter-claimants,

v.

25 TELSWITCH, INC., MERKT-WOOLFSON,  
AARON WOOLFSON, JERRY MERKT and ROES  
26 1-50

27 Counter-defendants.

1 Plaintiff and Counter-Defendant TelSwitch, Inc. ("TelSwitch") and Counter-Defendants  
 2 Merkt-Woolfson, Aaron Woolfson and Jerry Merkt (collectively, "Plaintiff/Counter-Defendants) and  
 3 Defendants Billings Solutions, Inc. ("BSI"), Sean Dunlea, Tim Portley, Dario Saal and Saal  
 4 Consulting (collectively, "Defendants"), and Counter-Claimants BSI, Sean Dunlea, and Tim Portley  
 5 (collectively, "Counter-Claimants) and collectively with Plaintiff/Counter-Defendants, the  
 6 ("Parties") hereby submit this joint statement.

7 **I. DEFENDANTS AND COUNTER-CLAIMANTS' STATEMENT**

8 Defendants/Counter-Claimants respectfully request that the Court vacate the Settlement  
 9 Conference currently set for February 22, 2013 before Magistrate Westmore.

10 As the Court will recall, at the January 29, 2013 hearing on Defendants' Motion for  
 11 Summary Judgment, the Court suggested that the parties might want to participate in a voluntary  
 12 settlement conference or other form of ADR before the Court rules on the motion. The Court then  
 13 gave the parties until February 1, 2013 to report back as to whether they wanted to engage in further  
 14 ADR and if so, what type.

15 Defendants/Counter-Claimants initially suggested that Magistrate Beeler would be an  
 16 effective Settlement Conference Judge as she already knows the case, having ruled on Plaintiff's  
 17 trade secret disclosure issue. Plaintiff /Counter-Defendants rejected Defendants' proposal that  
 18 Magistrate Beeler act as Settlement Conference Judge. As a compromise, after meet and confer,  
 19 Defendants/Counter-Claimants agreed to participate in a settlement conference before another  
 20 Magistrate subject to the condition that only counsel would appear in person at the conference and  
 21 all parties would appear by phone. This agreement is specifically reflected in the parties' February  
 22 1, 2013 joint letter to Judge Chen (Doc. 98 ).

23 After the case was assigned to Magistrate Westmore, the parties confirmed the agreed  
 24 procedure that the parties would appear by phone and counsel would appear in person.  
 25 Subsequently, Plaintiff's counsel informed Defendants/Counter-Claimants that he would now insist  
 26 that his client be present at the settlement conference while Defendants/Counter-Claimants could  
 27 appear by phone. Defendants/Counter-Claimants explained that this change is not acceptable, but  
 28 Plaintiff/Counter-Defendants have remained steadfast.

1       The reason that the pre-condition that all parties appear by phone is important is that the  
2 parties already participated in a full day of JAMS mediation with Judge James Warren (Ret) in  
3 November 2012 that was unsuccessful. Defendants/Counter-Claimants incurred a great deal of  
4 expense in connection with the preparation for and travel to that mediation from various out of state  
5 locations (Illinois, Rhode Island and Florida). While Defendants/Counter-Claimants remain willing  
6 to engage in ADR, they do not want have to again incur large travel and legal expense in connection  
7 with it. They also want to ensure that both parties are on equal footing and believe that there will be  
8 an unfair advantage if Plaintiff is present at the Settlement Conference when they cannot be. Thus,  
9 since the necessary pre-condition for further ADR – that the parties participate by phone – has been  
10 rejected after-the-fact by Plaintiff/Counter-Defendants, the currently scheduled Settlement  
11 Conference should be vacated.

12       Accordingly, Defendants/Counter-Claimants respectfully request that the Court vacate the  
13 February 22, 2013 Settlement Conference and rule on Defendants' pending Motion for Summary  
14 Judgment.

15 **II. PLAINTIFF'S AND COUNTER-DEFENDANTS' STATEMENT**

16       At the January 29, 2013 hearing on Defendants' Motion for Summary Judgment, counsel for  
17 Defendants expressed concern about the travel and legal expense that Defendants would incur by  
18 engaging in a second ADR attempt. Counsel therefore requested that Defendants be permitted to  
19 appear telephonically for further ADR. Plaintiff had no objection to allowing Defendants to appear  
20 telephonically. This Court then referred the matter to Judge Westmore for an emergency settlement  
21 conference.

22       Counsel never agreed to barring its own clients from appearing personally at the settlement  
23 conference. The issue of Plaintiff's appearance at the settlement conference only arose after the  
24 settlement conference was scheduled. Plaintiff had always intended to attend the settlement  
25 conference in person, believing face-to-face interaction to be more conducive to settlement  
26 discussions and therefore preferable whenever possible. And because Defendants' only stated reason  
27 for requesting permission to appear telephonically was to limit Defendants' travel and legal  
28 expenses, Plaintiff had no reason to believe that its own plans to appear in person (which, of course,

would have no impact on Defendants' travel and legal expenses) would be in any way objectionable. But when Plaintiff noted its intention to appear at the settlement conference in person, Defendants insisted that the "deal" was that **all** parties would **only** be permitted to appear telephonically (citing concerns about the parties being on equal footing at the settlement conference).

Perhaps this was Defendants' understanding all along, and there was merely a misunderstanding between the Parties (as noted above, the Parties never explicitly discussed Plaintiff's appearance at the settlement conference until after the settlement conference was scheduled). But even if so, Defendants' insistence that Plaintiff be denied the ability to be present at a settlement conference because of a perceived "unfair advantage" in a voluntary ADR proceeding hardly seems indicative of a good-faith desire to discuss settlement.

Plaintiff desires further ADR and welcomed the Court's order that the Parties engage in a settlement conference with Judge Westmore. But Plaintiff recognizes that ADR attempts can only be successful if all parties willingly engage in good faith, and therefore does not oppose Defendants' request to vacate the settlement conference.

#### RIDLESS LAW OFFICE

DATED: February 6, 2013

/s/ Joshua A. Ridless

Attorneys for Plaintiff and Counter-Defendants,  
TELSWITCH, INC., MERKT-WOOLFSON, AARON  
WOOLFSON and JERRY MERKT

#### DUANE MORRIS LLP

DATED: February 6, 2013

/s/ Eric J. Sinrod

Attorneys for Defendants and Counter-Claimants,  
BILLING SOLUTIONS INCORPORATED, SEAN  
DUNLEAVY, TIM PORTLEY, DARIO J. SAAL, and  
SAAL CONSULTING INC.,

IT IS SO ORDERED that Defendant's request is denied. Parties to contact Judge Westmore to discuss attendance and all other logistical issues.

Edward M. Chen, U.S. District Judge

